Office - Supreme Court, U. S.
FILED
MAY 19 1945
CHARLES ELMORE CROPLEY
CLERK

38

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1293 84

PARADISE LAND AND LIVESTOCK COMPANY,
A CORPORATION,
Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. D. SKEEN,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Brief in support of petition	6

Cases Cited

Crane v. *Federal Land Bank, In re Ewles Estate*, 143 P. (2nd) 903	11
Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370	9
United States v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488, 50 L. Ed. 569	11

Statutes Cited

Bankruptcy Act:	
Sec. 11(2), 11 U. S. C. A. 44	4
Sec. 62(d), 11 U. S. C. A. 102(d)	3, 4, 6
Sec. 75(b), 11 U. S. C. A. 203(b)	6
Federal Farm Loan Act:	
Sec. 771, 12 U. S. C. A. p. 830	4, 7, 10, 12
Sec. 791, 12 U. S. C. A. p. 840	4, 6, 10
Sec. 983, 12 U. S. C. A. p. 881	4, 6
Judicial Code, Sec. 240, 28 U. S. C. A. 347	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1293

PARADISE LAND AND LIVESTOCK COMPANY,
A CORPORATION,
Petitioner,

vs.

THE FEDERAL LAND BANK OF BERKELEY

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The petitioner is in bankruptcy under Section 75 (s). The Federal Lank Bank of Berkeley, a secured creditor, failed to file a claim covering its demands for attorney's fees and expenses amounting to $1726.00 and interest computed at the rate of 5½ per cent. The debtor filed a petition for an order requiring the creditor to appear and show cause why it should not file a statement of the amount it claimed to be legally due on mortgages from the debtor to it and offering, at the same time, to pay the full amount of the indebtedness in cash when fixed and determined by the court. It made a showing of its ability to make the payment.

At the hearing on the order to show cause, the debtor offered in evidence an itemized statement of the accounts

contained in a letter from the general counsel for the Land Bank to the attorney for the debtor, which the court received over the objections of the Land Bank. The statement shows the items going to make up attorney's fees and court costs and also the interest computed at 5½ per cent. There was also received in evidence a complaint for the foreclosure of mortgages with a decree of the state court in which the interest was computed at 5½ per cent. The decree was dated March 10, 1938, and was for but a part of the demands of the bank. No court had passed upon demands not included in the decree.

The district court refused to require the creditor to file its claim or to relieve the debtor of the payment of attorney's fees and expenses demanded by the creditor and in utter disregard of the Federal Farm Loan Statutes and the Bankruptcy Act, to which specific references will hereinafter be made, ordered the president of the petitioning corporation to submit to an examination and proceeded to take steps looking to the sale of the debtor's property. In these circumstances, the debtor appealed, and with approval of the court, by order made after the appeal was taken, sold part of its property, borrowed additional money and made payment of the entire demand of the bank. Upwards of $17,000.00 of the amount paid was made up of attorney's fees and excess interest which it paid under protest.

The appeal to the Circuit Court of Appeals for the Tenth Circuit was dismissed February 19, 1945. This petition is for a review of the order dismissing the appeal.

This Court has jurisdicton to issue the writ. Section 240, Judicial Code 28 U. S. C. A. 347.

The opinion of the Circuit Court of Appeals is found in 147 Federal Reporter 2nd 594.

The items going to make up $1726.00 attorney's fees and costs paid under protest are found in the record 22, 24 and 25.

The proceeding in the United States District Court for Utah is now pending and the debtor is subject to the jurisdiction of the court. The costs and expenses claimed by the creditor were incurred by the creditor during the time the proceeding has been pending in the federal court and are not taxable costs. No claim has been filed in the district court by the creditor or any attorney, and no affidavit has been made or filed as required by Section 62 (d) 11 U. S. C. A. 102 (d) of the Bankruptcy Act which reads as follows:

> "A custodian, receiver, or trustee or the attorney for any of them, or any other attorney, seeking compensation for services rendered by him in a proceeding under this Act or in connection with such proceeding, shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested and what allowances, if any, have theretofore been made to him. Such petition shall be accompanied by his affidavit stating whether an agreement or understanding exists between the petitioner and any other person for a division of compensation and, if so, the nature and particulars thereof. If satisfied that the petitioner has, in any form or guise, shared or agreed to share his compensation or in the compensation of any other person contrary to the provisions of this subdivision, the court shall withhold all compensation from such petitioner."

The district court allowed no claim, but on the contrary, arbitrarily dismissed this petitioner's petition for an order requiring the creditor to file its claim and to strike improper charges. Furthermore, the court having appointed a trustee was proceeding with the sale of the debtor's property to pay the creditor's claim of an unknown amount while the debtor was seeking an opportunity to pay the legal claim in full. With the approval of the court and under pressure of an impending sale, the debtor paid the wrongful demands of the creditor under protest.

The petition in this case should be granted for the following reasons:

1. The Circuit Court of Appeals for the Tenth Circuit by the dismissal of the appeals has so construed Section 75 (b) of the Bankruptcy Act as to destroy its clear intent.

2. By dismissal of the appeal, the Circuit Court of Appeals has sanctioned the coercion of payment of attorney's fees and other costs and expenses without compliance with Section 62 (d) 11 U. S. C. A. 102 (d) of the Bankruptcy Act, and in violation of its express terms.

3. By dismissal of the appeal, the Circuit Court of Appeals has sanctioned the disregard of Section 791 (Fifth) of the Federal Farm Loan Act, Title 12 U. S. C. A. page 840 in that the Federal Land Bank was permitted to demand and receive attorney's fees, costs and expenses not authorized by law.

4. By dismissal of the appeal, the Circuit Court of Appeals has sanctioned the disregard and express violation of the provisions of Section 983 of the Federal Farm Loan Act, U. S. C. A. Title 12, page 881, in that it sustained the payment of attorney's fees, costs and expenses in violation of the terms of the said statute.

5. By the dismissal of the said appeal, the Circuit Court of Appeals sanctioned the utter disregard of Federal Farm Loan Act, Section 771 (Twelfth) 12 U. S. C. A. page 830 in that it has sanctioned the collection of interest in excess of that provided by the statute.

6. By the dismissal of the said appeal, the Circuit Court of Appeals has sanctioned the arbitrary refusal of the district court to require a creditor to file its claim and to pass upon a claim as prescribed by the Bankruptcy Act, Section 11 (2) Title 11, U. S. C. A. page 44, and to sell and dis-

pose of debtor's property for failure to pay claims not liquidated by the court having exclusive jurisdiction over the debtor and his property.

7. By dismissal of the appeal, the Circuit Court of Appeals has departed from the uniform practice in that it has required the debtor, while subject to the exclusive jurisdiction of the district court, to resort to an independent suit to recover money paid under protest pursuant to the orders of the court where there are other creditors and where such payments involved attorney's fees and costs claimed in the pending proceeding.

Wherefore, petitioner prays that a Writ of Certiorari be issued by this court directing that all proceedings in the Circuit Court of Appeals for the Tenth Circuit be certified and that the judgment of the said Circuit Court of Appeals and the judgment of the District Court of the United States for the District of Utah be reversed with directions.

J. D. Skeen,
Attorney for Petitioner.

SUPPORTING BRIEF

The demand of the creditor for attorney's fees and costs was wrongful because:

1. No claim was filed or allowed as required by Section 62 (d) 11 U. S. C. A. 102 (d) of the Bankruptcy Act, and

2. Section 75 (b) 11 U. S. C. A. Section 203 (b) provides:

> "No fees, costs or other charges shall be charged or taxed to any farmer or to his creditors by any conciliation commissioner or with respect to any proceeding under this section except as hereinbefore in this section provided."

There is no provision of the statute authorizing a creditor to charge attorney's fees against the debtor while the proceeding is pending in the federal court. Likewise, the Farm Loan Act, U. S. C. A. Title 12, Section 791, page 840 provides:

> "No federal land bank shall have power * * *
>
> Fifth. To demand or receive under any form or pretense any commission or charge not specifically authorized in this subchapter."

and Section 983, page 881 of the same act provides as follows:

> "Other than the usual salary or director's fee paid to any officer, director, or employee of a national farm loan association, a Federal land bank or a joint stock land bank, and other than a reasonable fee paid by such association or bank to any officer, director, attorney, or employee for services rendered, no officer, director, attorney, or employee of an association or bank organized under this subchapter shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such asso-

> ciation or bank. No land bank or national farm loan association organized under this subchapter shall charge or receive any fee, commission, bonus, gift, or other consideration not herein specifically authorized."

We do not know to whom the attorney's fees included in the claim were paid, for as above observed, no claim was filed, and there was no affidavit as required by the bankruptcy statute setting forth the names of the attorneys and otherwise complying with the statute. We assume, therefore, that the bank retained the money so paid under protest. We are not advised as to whether the bank so flagrantly disregards the statute in states other than Utah; nor should that be controlling in the consideration of this petition for if the practice is approved as it has been by the lower courts the charges no doubt will be made throughout the territory served by this particular bank at least.

Section 771, paragraph 12, of the Federal Farm Loan Act, forbids the collection of interest in excess of 3½ per cent.

During the difficult days of 1933 and 1934, when a large proportion of the farmers were in great distress, Section 771 of the Federal Farm Loan Act was amended by the addition to Section 771, paragraph No. 12, which so far as germane reads as follows:

> "* * * Notwithstanding the provisions of paragraph 'second' of this section, the rate of interest on any loans on mortgage made through national farm loan associations or through agents as provided in sections 801 to 808 of this chapter, or purchased from joint stock land banks, by any Federal land bank, outstanding on May 12, 1933, or made through national farm loan associations after such date, shall not exceed 3½ per centum per annum for all interest payable on installment dates occurring within a period of two years commencing July 1, 1935; and no payment of the principal portion of any installments of any such

loan outstanding on the dates of June 3, 1935, shall be required prior to July 11, 1938, if the borrower shall not be in default with respect to any other condition or covenant of his mortgage."

This act was re-enacted from time to time and was controlling in the computation of interest on all the Federal Land Bank mortgages to June 30, 1944. Notwithstanding the very terms of the Act, the Federal Land Bank computed the interest as against this debtor at the rate of 5½ per cent per annum. It has discriminated against a delinquent farmer, one of those for whose benefit the statute was obviously enacted. For the purpose of conforming to the federal statute, the board of directors of the Federal Land Bank on August 29, 1939, passed the following resolution:

"Consideration was given to the extension of delinquent Land Bank borrowers' accounts with reference to the Bank's present procedure of employing forbearance agreements instead of formal extensions. Under formal extensions delinquent borrowers would be entitled to the statutory interest rate on extended installment delinquencies, but considerable expense would be incurred by the Bank in setting up formal extensions on its books, due to the necessity of obtaining the formal application to be signed by all parties responsible for the loan, etc. This expense is believed to exceed the amount which the Bank might collect from the Treasury of the United States under claim for interest reduction. The Board of Directors, therefore, concluded that the Bank should continue with its present practice of carrying delinquencies under the informal forbearance agreements, but in order to give borrowers the same rate of interest that they could enjoy under formal extensions, it was decided to reduce the penalty interest rate from 6 per cent to 3½ per cent on association endorsed loans, 3¾ per cent on loans made under Section 25 (b) during the period prior to the completion of a

> compartment, and 4 per cent on direct loans. The new penalty interest rates are to be effective September 1 and will apply to items delinquent on and after that date."

The record in the court below does not disclose by what authority the agents of the Federal Land Bank disregarded the resolution of the board of directors as well as the statute. The statute is applicable to all of the Federal land banks in the United States and an authoritative construction of it is essential to the conduct of the business of the farmers and the banks.

The Land Bank contended that the judgment of the State court in which interest was computed at 5½ per cent and which by its terms directed that interest should be added from the date of the judgment until payment at the same rate was controlling, and the court found and decreed that:

> "That certain judgment or decree of foreclosure entered in the District Court in and for Cache County, Utah, in that certain action in said court wherein the Federal Lank Band of Berkeley is the plaintiff and Joseph B. White and the said bankrupt and others are the defendants on March 10, 1938, which action was brought by said plaintiff for the foreclosure of three certain mortgages held by said plaintiff and covering the real property of said bankrupt is in all respects valid and binding upon this Court in this proceeding."

This judgment was made in disregard of the Federal statute, and notwithstanding the State court judgment covered only a part of the demands of the creditor, and it had nothing whatsoever to do with the costs and attorney's fees.

A State court may not disregard the prohibition of a Federal statute.

Kalb v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370.

The Federal statute, Section 771 (Twelfth) U. S. C. A. page 830, says the rate of interest

> " * * * shall not exceed 3½ per cent per annum."

and Section 791. Title 12, page 840, U. S. C. A. says:

> "No Federal Lank Bank shall have power * * *
>
> Fifth. To demand or receive under any form or pretense any commission or charge not specifically authorized in this subchapter."

Thus the bank is prohibited from charging more than 3½ per cent interest and to make doubly certain that it does business within the bounds fixed it is prohibited from receiving money except as authorized by the statute. Regardless of the validity of the judgment of the State court including within its express terms 5½ per cent interest, and even though the bank had a right to cause execution to be issued and the full amount of the judgment collected, still it would have no right to receive money in excess of 3½ per cent, and if it received it, it still would have no right to hold it because of the prohibition of the statute.

There is another phase of this case which must appeal to the court. The district court has so far departed from the accepted and usual course of judicial proceedings and the Circuit Court of Appeals has so far sanctioned such a departure by the lower court that this Court should exercise its power of supervision. Reference is made to the fact that the district court by the dismissal of the petitions of the debtor refused to pass upon costs and attorney's fees charged by the bank as a creditor of the bankrupt while the proceeding was pending in that court, and the Circuit Court of Appeals has sanctioned such an utter disregard of the usual and necessary practice of the court passing upon its own costs and expenses. Furthermore, the Circuit Court of Appeals has relegated this debtor to a plenary suit, per-

haps in the State where the Federal Land Bank maintains its principal office for it is not a resident of the State of Utah,

Crane v. *Federal Land Bank, in re: Ewles Estate,* 143 P. 2nd 903;

for the sole purpose of determining whether in the district court for the District of Utah, the Federal Land Bank had a right to demand and receive attorney's fees and expenses. The court also departed from the accepted course of procedure in refusing specifically to pass upon the amount of the bank's claim which included interest. The debtor is told to go into another court in a plenary suit to determine what the district court should or should not allow, and inasmuch as the matter is still pending in the district court presumably it would be necessary to file the judgment of a foreign court in the district court for such disposition as the district court should then see fit to make.

These statutes all pertain essentially to the business of federal agencies, and it is of the utmost importance that they be construed and the law and the procedure authoritatively settled.

The payment in this case was in no sense voluntary for the court was proceeding to sell the property notwithstanding the mortgagor was able and willing to pay the full legal obligation. It was compelled to pay or suffer the loss of the property. The case comes clearly within the rule laid down in

United States v. *New York & Cuba Mail Steamship Co.,* 200 U. S. 488, 50 L. Ed. 569.

The record throughout in this case discloses the persistent disregard of the provisions of the Federal Farm Loan Act clearly intended to limit and restrict the federal land banks in their demands for money to the express authority con-

ferred by the act. The banks are not authorized to demand and receive money wherever they may as commercial institutions. Their authority on the whole is limited to making loans and to collecting interest within the limitations of the Act, and the principal in the manner prescribed by law. Neither have they power to authorize attorneys indiscriminately to demand and collect fees wherever they may. It will be found that mortgages taken by reference incorporate the Federal Farm Loan Act and that Congress reserved the right to limit and restrict the interest collected as it did by Section 771 (Twelfth).

It is respectfully submitted that because of the clear disregard and violation of the federal statutes that a writ should issue.

Respectfully submitted,

J. D. SKEEN,
Attorney for Petitioner.

(8287)